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NO. 87-1165
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

UNITED STATES, et al.,
Respondents.

On Writ of Certiorari
To The United States
Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE KLAMATH TRIBE; THE NEZ PERCE TRIBE; THE SWINOMISH TRIBAL COMMUNITY; ET AL. (additional amici listed on inside cover) IN SUPPORT OF RESPONDENTS

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August, 1988

Jicarilla Apache Tribe;
Pueblo of Laguna;
Pueblo of Santa Ana;
Pyramid Lake Paiute Tribe Of Indians;
Rosebud Sioux Tribe;
Sac & Fox Tribe of Indians of Oklahoma;
and
Southern Ute Indian Tribe

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

INTEREST OF THE AMICI CURIAE.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

I. THE QUIET TITLE ACT PROHIBITS THIRD PARTY SUITS WHICH SEEK TO DIVEST THE UNITED STATES OF TITLE TO INDIAN LANDS.....4

A. The Indian Lands Exception Applies.....4

B. A "Substantial Possibility" Test Is Not Required.....8

II. ASSUMING ARGUENDO THE QUIET TITLE ACT DOES NOT BAR THIS ACTION, BROAD JUDICIAL REVIEW OF THIRD PARTY SUITS WOULD VIOLATE THE HISTORICAL FEDERAL OBLIGATION TO PROTECT INDIAN LANDS.....12

III. WHEN THE UNITED STATES WAIVES ITS SOVEREIGN IMMUNITY TO ASSERT A CLAIM FOR INDIAN WATER RIGHTS, THE WAIVER DOES NOT EXTEND TO "ANCILLARY PROCEEDINGS".....21

A. The Court of Appeals Correctly Held That Any Waiver of Immunity By The United States In Arizona v. California Does Not Extend To This Separate Action.....21

Page

B. The McCarran Amendment Does Not Waive Immunity In This Action.....26

CONCLUSION.....29

TABLE OF AUTHORITIES

Cases — Page(s)

Arizona v. California, 460 U.S. 605 (1983).....Passim

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).....28

Block v. North Dakota, 461 U.S. 273 (1983).....5, 17, 21, 22

Cady v. Morton, 527 F.2d 786 (9th Cir. 1975).....11

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).....28

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).....17, 19

Dugan v. Rank, 372 U.S. 609 (1963).....27

Fadem v. United States, 791 F.2d 1381 (9th Cir. 1986).....11

Felix v. Patrick, 36 F. 457 (C.C. Neb. 1888), aff'd, 145 U.S. 317 (1892).....19

Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856).....17

Heckman v. United States, 224 U.S. 413 (1912).....13

In Re General Adjudication of All Rights To Use Water In The Big Horn River System, 750 P.2d 681 (Wyo. 1988).....11

Cases	Page(s)
Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)	13, 17
Jones v. United States, 195 F.2d 707 (9th Cir. 1952)	11
Marsh v. Brooks, 49 U.S. (8 How.) 223 (1850), rev'd 55 U.S. (14 How.) 513 (1852)	17
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	20
Minnesota v. United States, 305 U.S. 382 (1939)	6
Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985)	9
Narrangansett Tribe v. Southern R.I. Land Dev. Corp., 418 F.Supp. 798 (D. R.I. 1976)	20
Nevada v. United States, 463 U.S. 110 (1983)	26
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)	17, 20
Schaghticoke Tribe v. Kent School Corp., 423 F.Supp. 780 (D.Conn. 1976)	20
Spaeth v. United States Secretary of the Interior, 757 F.2d 937 (8th Cir. 1985)	10
Spalding v. Chandler, 160 U.S. 394 (1896)	16

Cases	Page(s)
State of Florida, Dept. of Business Regulation v. United States Dept. of the Interior, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)	7
Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct.Cl. 1974)	16
United States ex. rel. Hualapi Indians v. Santa Fe Pac. R.R., 314 U.S. 339 (1941)	16
United States v. District Court for Eagle County, 401 U.S. 520 (1971)	27
United States v. Minnesota, 270 U.S. 181 (1926)	16
United States v. Mottaz, 476 U.S. 834 (1986)	Passim
United States v. Sands, 94 F.2d 156 (10th Cir. 1938)	19
United States v. Sherwood, 312 U.S. 584 (1941)	22
United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)	16
Williams v. Lee, 358 U.S. 217 (1959)	20

Cases **Page(s)**

Wilson v. Omaha Indian Tribe,
442 U.S. 653 (1979).....10, 19

Statutes

5 U.S.C. §702.....5

18 U.S.C. §1160.....18

18 U.S.C. §1165.....18

25 U.S.C. §177.....13, 14

25 U.S.C. §§179-180.....18

25 U.S.C. §194.....10, 19

25 U.S.C. §§476-477.....14

28 U.S.C. §1346(a)(2).....11

28 U.S.C. §2409a.....Passim

28 U.S.C. §2409a(a).....4

43 U.S.C. §666.....26

1 Stat. 137, 138.....18

1 Stat. 329.....18

1 Stat. 469, 470.....18

2 Stat. 527.....14

24 Stat. 545, 546.....15

25 Stat. 452, 457.....15

25 Stat. 676, 677.....15

Statutes **Page(s)**

26 Stat. 663, 664.....15

28 Stat. 107.....15

34 Stat. 1229.....15

34 Stat. 267-268.....15

36 Stat. 557, 558-559, 569.....15

43 Stat. 636.....12, 14

Other Authorities

Congressional Materials

House Rep. No. 92-1559,
reprinted in 1972 U.S.
Code Cong. & Admin. News 3,
92d Cong. 2d Sess. at 4547,
4556-57.....7

Administrative Materials

Bureau of Indian Affairs, U.S. Dept.
of the Interior, Annual Report on
Indian Lands (1985).....13

Bureau of Indian Affairs, U.S. Dept.
of the Interior, Budget
Justifications F.Y. 1989 (1988).....23-24

Treatises

F. Cohen, Handbook of Federal
Indian Law (1982 ed.).....10, 15

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**BRIEF AMICUS CURIAE OF
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THE NEZ PERCE TRIBE;
SWINOMISH TRIBAL COMMUNITY; ET AL.
IN SUPPORT OF RESPONDENTS**

INTEREST OF THE AMICI CURIAE

Amici curiae are ten (10) federally recognized Indian tribes.[1/] Amici have

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[1/] Counsel for petitioners and counsel for respondents have consented to the filing of the brief of amici in support of respondents. The consents are submitted herewith.

a substantial interest in the issues raised in this case. The issues involve the scope of the Indian lands exception to the Quiet Title Act, 28 U.S.C. §2409a, and the extent of a waiver of federal sovereign immunity when the United States asserts water rights claims on behalf of Indian tribes. One amici tribe is involved in a dispute over title to its lands. Other amici tribes anticipate quantification of their water rights in proceedings in which the United States is involved. All amici are concerned that, because of the extensive federal control over Indian lands and resources, limited relief in federal courts against the United States must be preserved. Amici are convinced that the United States' ability to protect Indian property from interference by third parties will be severely undermined by the availability of judicial relief.

SUMMARY OF ARGUMENT

The Indian lands exception to the Quiet Title Act (QTA) retains immunity in suits seeking to divest the United States of title to Indian trust lands. The Court of Appeals' construction of the QTA should be affirmed because it is consistent with established congressional policy and decisions of this Court protecting tribal land holdings. Interference by third parties has been particularly disfavored by Congress and the Court.

The decision below is also consistent with the basic policy behind sovereign immunity: that governments should not be in court unless and until their legislative branches consent to suit. Moreover, a broad interpretation of waivers of federal sovereign immunity would essentially discourage performance by the federal trustee of its duty to

represent Indian tribes in critical water rights matters. Finally, judicial review in separate actions of issues raised in water rights adjudications would lead to uncertainty and delay in the quantification of important treaty water rights. This would adversely affect judicial resources as well as the natural and financial resources of all parties. Congress and this Court have repeatedly disapproved of piecemeal adjudication of water rights.

ARGUMENT

I. THE QUIET TITLE ACT PROHIBITS THIRD PARTY SUITS WHICH SEEK TO DIVEST THE UNITED STATES OF TITLE TO INDIAN LANDS.

A. The Indian Lands Exception Applies.

The Quiet Title Act, 28 U.S.C. §2409a (QTA), generally waives the United States' sovereign immunity in actions involving the United States' title to real property. 28 U.S.C. §2409a(a).

However, the QTA expressly excepts actions seeking to divest the United States of title to Indian lands. Id. Because Petitioners' suit seeks to divest the United States of title to Indian lands, the QTA's Indian lands exception applies and sovereign immunity bars the suit.[2/]

The Court of Appeals correctly found that Congress intended to insulate Indian lands from challenges such as that posed by Petitioners' suit. The fact that Petitioners neither claim an interest in the land, nor seek to recover title in their own names is irrelevant. Pet. Br.

2/This Court has twice held that the QTA is the exclusive means by which the United States' title to real property can be challenged. United States v. Mottaz, 476 U.S. 834 (1986); Block v. North Dakota, 461 U.S. 273 (1983). And, since the QTA forbids the suit, the APA, by its own terms, does as well. 5 U.S.C. §702; see Block v. North Dakota, 461 U.S. at 286 n.22. Therefore, Petitioners' action, brought under the APA, cannot lie.

at 25-36. The relief Petitioners seek (a judicial declaration that the lands are no longer held in trust for the Tribes) would in fact divest the United States of title to Indian lands. That is the test for whether the Indian lands exception applies; not whether the challenger would in fact obtain the land. Nothing in the QTA or legislative history indicates otherwise. See United States v. Mottaz, 476 U.S. at 842 (description of claim and relief sought bring suit within the scope of the QTA).

Moreover, before the QTA, sovereign immunity barred all suits challenging federal land holdings. Minnesota v. United States, 305 U.S. 382 (1939). The QTA generally waived immunity in land title dispute suits, but expressly retained it where title to Indian lands

is involved.[3/] Since the Indian lands exception prohibits direct challenges by third parties claiming an interest in the land, a fortiori it prohibits challenges by those with any interest less than the land itself, i.e., Petitioner Metropolitan Water District's contract rights, or potentially affected water users. See State of Florida, Dept. of Business Regulation v. United States Dept. of the Interior, 768 F.2d 1248, 1254-55 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986).

3/This Court has noted that the Indian lands exception is "necessary to prevent abridgment of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands." United States v. Mottaz, 476 U.S. at 843 n.6, quoting letter from Solicitor of the Department of the Interior to Chairman, Committee on Interior and Insular Affairs, appended to House Rep. No. 92-1559, reprinted in 1972 U.S. Code Cong. & Admin. News 3, 92d Cong. 2d Sess. at 4547, 4556-57.

In addition, as in this case, tribal lands often border on other federal lands. Given the amount of land held in trust for tribes, and the number of water users affected by tribal water rights (see infra Parts II and III of this Brief), if this suit is permitted, third parties could devastate Indian land holdings. Therefore, this Court should affirm the decision below that Petitioners' action is within the meaning of suits prohibited by the Indian lands exception to the QTA.

B. A "Substantial Possibility" Test Is Not Required.

Petitioners argue that if the QTA applies, the United States should be required to prove that there is at least a "substantial possibility" that the disputed lands are trust or restricted Indian lands. Pet. Br. at 36-43. However, nothing in the QTA or its

legislative history supports that notion. This Court has held that "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." United States v. Mottaz, 476 U.S. at 843 (footnote omitted; emphasis added).[4/]

In addition, the respondent Tribes have aptly pointed out the fallacy in Petitioners' argument. Tr. Opp. Br. at 16-17. The substantial possibility test would permit a court to exercise jurisdiction over the merits of the United States' claim; thereby rendering

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4/Amici maintain that the QTA is unambiguous, and that it should be accorded its plain meaning. However, if there is any doubt about the meaning of the statute, it should be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

the Indian lands exception meaningless.[5/] See F. Cohen, Handbook of Federal Indian Law 322 n.335 (1982 ed.), and Wilson v. Omaha Indian Tribe, 442 U.S. 653, 668-669 (1979) (rejecting argument that proof of prior possession or Indian title is a precondition to application of the burden of proof statute, 25 U.S.C. §194, and holding that where a tribe makes out a prima facie case of prior possession or title to a disputed area, §194 is triggered.)[6/]

Finally, Petitioners' argument as to the "mischief" that will result in the absence of a substantial possibility test

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5/For these reasons, as the Tribes and United States point out, Spaeth v. United States Secretary of the Interior, 757 F.2d 937 (8th Cir. 1985), is either incorrect or limited to its unique facts.

6/Alternatively, should this Court find that the substantial possibility test does apply, that test has been met in this case. U.S. Opp. Br. at 16.

is superficial and misleading. Pet. Br. at 41. The United States rarely simply "redraws boundaries," as Petitioners suggest. Moreover, if an adverse claimant is actually in possession of the property, the United States would sue for ejectment, thereby permitting third parties a "day in court" on the merits of their ownership claim. See, e.g., Jones v. United States, 195 F.2d 707 (9th Cir. 1952). Adverse claimants may also be protected by water rights adjudications in which title issues may be litigated, e.g., In Re General Adjudication of All Rights To Use Water In The Big Horn River System, 750 P.2d 681 (Wyo. 1988), and they may have remedies under the Tucker Act, 28 U.S.C. §1346(a)(2). United States v. Mottaz, 476 U.S. at 847; Fadem v. United States, 791 F.2d 1381 (9th Cir. 1986). To the extent third parties have environmental concerns, they may sue

under environmental laws even if Indian interests are involved. E.g., Cady v. Morton, 527 F.2d 786 (9th Cir. 1975). Finally, Congress may validate non-Indian claims to tribal lands. E.g., Pueblo Lands Act of 1924, ch. 331, §4, 43 Stat. 636, 637.

This Court's reasoning in Mottaz that the United States need only claim an interest in the land for the Indian lands exception to apply is fully applicable here. Alternatively, the Court should adopt the ruling of the Court of Appeals that a "colorable claim" by the United States is sufficient.

II. ASSUMING ARGUENDO THE QUIET TITLE ACT DOES NOT BAR THIS ACTION, BROAD JUDICIAL REVIEW OF THIRD PARTY SUITS WOULD VIOLATE THE HISTORICAL FEDERAL OBLIGATION TO PROTECT INDIAN LANDS.

This Court has noted the necessity of the Indian lands exception: to prevent abridgment of "solemn obligations" and "specific commitments" that the federal

government made to Indians regarding their lands. United States v. Mottaz, 476 U.S. at 843 n.6. Indeed, the protection of Indian land holdings is central to the federal government's trust obligation to Indians. Heckman v. United States, 224 U.S. 413 (1912).[7/] Examples of early attempts by this Court and Congress to establish a foundation for the recognition and protection of Indian property interests are found in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), in which the Court held that the United States has the exclusive right to purchase or extinguish Indian title, and the Non-Intercourse Act, 25 U.S.C. §177, which prohibits Indian land transactions except as authorized by

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7/ The United States holds about 44 million acres of land in trust for Indian tribes. Bureau of Indian Affairs, U.S. Dep't of the Interior, Annual Report on Indian Lands (1985).

Congress. Two hundred years later, the federal government still controls Indian property, most notably by treaties in which the United States contractually undertook to protect lands in Indian ownership.

Notwithstanding a period of harmful and since repudiated policies (e.g., allotment, homesteading, and sale of surplus lands without tribal consent), Congress has repeatedly pledged to protect Indian property. The congressional policy has been manifested in a number of ways. Most importantly, there are general and specific statutory restraints on alienation of and trespass on tribal lands.[8/] Congress has consistently exempted tribal lands from

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8/E.g., 25 U.S.C. §177; 25 U.S.C. §§476-477; Act of June 7, 1924, ch. 331, §17, 43 Stat. 636, 641 (Pueblos); Act of Feb. 28, 1809, ch. 23, 2 Stat. 527 (Alabamas and Wyandotts).

general legislation that opened the public domain to settlement,[9/] or that provided land grants to railroads.[10/] Congress also affirmed the immunity of Indian lands from state taxation and jurisdiction in the enabling acts of many western states,[11/] and has enacted protections against or refused to consent to condemnation of tribal lands by states.[12/]

9/E.g., Act of Mar. 2, 1907, ch. 2535, 34 Stat. 1229.

10/E.g., Act of Sept. 1, 1888, ch. 936, §15, 25 Stat. 452, 457 (Shoshones and Bannocks); Act of Oct. 1, 1890, ch. 1277, §5, 26 Stat. 663, 664 (Siletz Confederated Tribes); Act of Mar. 3, 1887, ch. 366, §5, 24 Stat. 545, 546 (Crows).

11/Act of June 20, 1910, ch. 310, §§2, 20, 36 Stat. 557, 558-559, 569 (N.M. and Ariz.); Act of June 16, 1906, ch. 3335, §1, 34 Stat. 267-268 (Okla.); Act of July 16, 1894, ch. 138, §3, 28 Stat. 107 (Utah); Act of Feb. 22, 1889, ch. 180, §4, 25 Stat. 676, 677 (N.D., S.D., Mont., Wash.).

12/See F. Cohen, supra at 521 & 523 n.104-105.

The longstanding congressional policy has been supplemented by judicial protection. Thus, executive action authorizing the alienation of tribal lands is ineffective absent congressional authorization. United States ex. rel. Hualapi Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941); Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct.Cl. 1974). Congressional authorization to alienate or interfere with Indian land must be express, not implied. Santa Fe, 314 U.S. at 353-354; United States v. Minnesota, 270 U.S. 181 (1926); Spalding v. Chandler, 160 U.S. 394 (1896). Judicial review of congressional action is appropriate, and Congress must compensate tribes for the abrogation of recognized title. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The United States and tribes may sue for ejectment,

trespass, or possession where Indian lands are involved. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (Oneida I); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Marsh v. Brooks, 49 U.S. (8 How.) 223 (1850), rev'd 55 U.S. (14 How.) 513 (1852); see also Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856). Officer suits cannot be used to circumvent the restrictions of the QTA, in part because "the Indian lands exception to the QTA would be rendered nugatory." Block v. North Dakota, 461 U.S. at 285. Most recently, this Court found liability for wrongful possession of Indian lands conveyed in 1795 without federal consent. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (Oneida II). The cases well-illustrate the sanctity of Indian lands that is threatened by this action.

Federal law has particularly protected tribal possessory rights against interference by third parties. The early Trade and Intercourse Acts sought to restrain and punish various types of trespass on Indian lands.[13/] Current federal statutes provide criminal penalties for unauthorized hunting, trapping, or fishing on Indian land, and provide a restitutionary remedy against non-Indian trespassers who injure or destroy property on Indian lands. 18 U.S.C. §1165, §1160. Federal statutes also forbid the grazing of livestock on Indian lands without tribal consent and preclude unauthorized persons from settling on Indian lands. 25 U.S.C. §§179-180.

13/ E.g., Act of May 19, 1796, ch. 30, §4, 1 Stat. 469, 470; Act of Mar. 1, 1793, ch. 19, §4, 1 Stat. 329; Act of July 22, 1790, ch. 33, §5, 1 Stat. 137, 138.

Federal law also allocates the burden of proof in certain land title disputes. Under 25 U.S.C. §194, the ultimate burden of persuasion in land claim cases involving an Indian is allocated to the non-Indian claimant once the Indian has shown previous possession or ownership. This statute has been held applicable to tribal land claims, to suits instituted by the United States as trustee for tribal lands, and to individual Indian land claims. Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); United States v. Sands, 94 F.2d 156 (10th Cir. 1938); Felix v. Patrick, 36 F. 457 (C.C. Neb. 1888), aff'd, 145 U.S. 317 (1892). State law defenses of adverse possession, statutes of limitation, and abatement generally are unavailable against Indians in land claims litigation. Oneida II, 470 U.S. at 240-246. Nor can Indian possessory rights generally be defeated

by tribal inaction or by tribal efforts to convey property interests in a manner inconsistent with the federal laws restraining alienation. Schaghticoke Tribe v. Kent School Corp., Inc., 423 F.Supp. 780 (D.Conn. 1976); Narrangansett Tribe v. Southern R.I. Land Dev. Corp., 418 F.Supp. 798 (D. R.I. 1976); see also Oneida I, 414 U.S. 661. Finally, the federal government has long recognized that Indian tribes have broad inherent civil jurisdiction over their lands, including authority to exclude nonmembers. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Williams v. Lee, 358 U.S. 217 (1959).

Thus, protection of Indian lands, especially against interference by third parties, has been a cornerstone of federal Indian policy. The goal has been to insulate Indian lands from the full impact of market forces, and to preserve

a land and resource base for the furtherance of Indian values. But because of the extensive federal control over Indian affairs, limited relief in federal courts against the United States where Indian lands are involved is essential. If broad judicial relief is permitted, third parties will eventually erode Indian land ownership without tribal consent, thereby interfering with tribal culture, society, and self-government.

III. WHEN THE UNITED STATES WAIVES ITS SOVEREIGN IMMUNITY TO ASSERT A CLAIM FOR INDIAN WATER RIGHTS, THE WAIVER DOES NOT EXTEND TO "ANCILLARY PROCEEDINGS."

A. The Court of Appeals Correctly Held That Any Waiver of Immunity By The United States In Arizona v. California Does Not Extend To This Separate Action.

Generally, a waiver of sovereign immunity must be express. Block v. North Dakota, 461 U.S. at 280. Waivers are to

be strictly construed. Id. at 287. Waiver is premised upon congressional consent, not judicial fiat or public policy reasons. This Court has often affirmed the basic policy behind sovereign immunity: that governments should not be in court unless and until their legislative branches consent to suit. Block v. North Dakota; United States v. Sherwood, 312 U.S. 584 (1941).[14/] As discussed above, Congress has retained immunity in suits seeking to divest the United States of title to Indian lands. As Petitioners admit, there is neither law nor evidence

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14/For this reason, Petitioners' arguments that this Court's statements in Arizona v. California, 460 U.S. 605 (1983), "waived" the United States' immunity in this action, and that "there are no public policy reasons which support limiting the waiver to the original forum selected by the United States," are inapposite. Pet. Br. at 16 & 18-24.

of congressional intent which would subject the United States to suit in a separate action merely by virtue of its involvement in Arizona v. California. Pet. Br. at 18-19. Therefore, the Court of Appeals correctly recognized that the United States is immune from Petitioners' action unless and until Congress decides to waive that immunity.

Even assuming arguendo that this Court could waive immunity, it should not. "Back-door" suits such as Petitioners' directly contradict settled congressional and judicial policy to insulate Indian property from such challenges. See supra Part II of this Brief. Moreover, there are presently over 60 pending water rights cases in which Indian rights are being adjudicated. Bureau of Indian Affairs, U.S. Dep't of the Interior Budget Justifications, F.Y. 1989, 165

(1988).[15/] Most of the adjudications impact more than one tribe. The tribes and the United States should not be forced to defend in separate actions perhaps a multitude of boundary and title issues (or the general authority of the United States over Indian affairs) merely because they are seeking to have their water rights adjudicated.

In addition, a rule that a waiver in one action extends to others is particularly harmful to tribes because it amounts to a unilateral waiver by the United States where the United States claims water rights as trustee on behalf of a tribe. Tribal land titles and perhaps other issues would automatically

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15/ In addition, the United States may claim water rights on behalf of other federal interests, including the Fish and Wildlife Service, the National Park Service, the Bureau of Reclamation, the Bureau of Land Management, and the Forest Service.

be subject to challenge without tribal consent. Such a rule would essentially discourage tribes from insisting that the United States perform its duty to represent them in the resolution of critical water rights issues. It would also lead to the curious result that tribes representing themselves would enjoy immunity in separate actions but tribes represented by the United States would not. This would be particularly awkward in cases where more than one tribe is participating in the same general stream adjudication; one tribe might have immunity from separate actions and others would not.

Finally, permitting judicial review in separate actions of issues raised in water rights adjudications would result in delay and uncertainty in the quantification of important treaty water rights--the very antithesis of this

Court's reasoning in Nevada v. United States, 463 U.S. 110 (1983) and Arizona v. California, 460 U.S. 605 (1983). This case is a prime example. The burden on judicial resources as well as on limited tribal and federal financial resources would be intolerable.

B. The McCarran Amendment Does Not Waive Immunity In This Action.

Petitioners argue that this action is a "partial stream adjudication" and therefore permitted under the McCarran Amendment, 43 U.S.C. §666. Pet. Br. at 45. However, this action is a suit over land title, not water rights. It is also a challenge to the authority of the Secretary of the Interior to correct erroneous reservation boundaries. But Petitioners do not and cannot seek to have their water rights adjudicated in this action, in part because it is not a

a comprehensive proceeding in which all the water users to the water source have been joined. See Dugan v. Rank, 372 U.S. 609 (1963).

Moreover, although the issues to which Petitioners seek resolution (the location of the boundaries and the title status of the lands) were raised in an action that might be a general stream adjudication, i.e., Arizona v. California, their proposition that the McCarran Amendment subjects the United States to suit on these related issues in a forum other than a court of competent jurisdiction over the general stream adjudication lacks authority and merit. A McCarran Amendment waiver extends only to general stream adjudications, not actions by individual water users. United States v. District Court for Eagle County, 401 U.S. 520 (1971). Moreover,

the McCarren Amendment was intended to avoid the very piecemeal adjudiciation of water rights issues that would result if separate actions on various issues were permitted. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). This Court has consistently honored the intent behind the McCarren Amendment and should do so in this case, especially where Petitioners have a forum, Arizona v. California, for resolution of the issues involved. To craft a rule otherwise would disrupt settled congressional policy, overturn major decisions of this Court, and potentially devastate tribal land holdings.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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